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IN THE

Supreme Court of the United States

OCTOBER TERM, 1921.

No. 140

JAMES J. RAFFERTY, As Collector of Internal Revenue for the Philippine Islands,

Petitioner,

vs.

COMPANIA GENERAL DE TABACAS DE FILIPINAS,

Respondent.

No. 142

JAMES J. RAFFERTY, As Collector of Internal Revenue for the Philippine Islands,

Petitioner,

vs.

VISAYAN REFINING COMPANY,

Respondent.

BRIEF FOR RESPONDENTS

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TABLE SHOWING CHRONOLOGICAL RELATION OF PHILIPPINE LAWS, ACTS OF CONGRESS, AND FACTS OF THIS CAUSE.

Dates	Philippine Laws	Acts of Congress	Facts
1914 July 1	Act No. 2339, "The Internal Revenue Law of 1914." Sec. 40 imposes a tax of 1/3% on merchants' sales. Sec. 41 exempts exports.	(This Act has not been ratified by Congress)	
1915	Acts No. 2432 and 2445 effective for the year 1915, amend Sec. 40 of Act 2339 by increasing tax to 1%. The exemption of exports is left in force.	(see Mch. 4, 1915 infra)	
Mch. 4		Act of Congress of March 4, 1915, ratifies the internal revenue taxes imposed by Acts 2432 and 2445. (38 Stat. L. 1143)	
1916	Act No. 2541, effective for the years 1916 and 1917, by amendment of Sec 40 of Act 2339 continues the 1% tax on merchants' sales, and by amendment of Sec. 41 of Act 2339 repeals the exemption of exports.	(see July 1, 1916, infra)	

TABLE SHOWING CHRONOLOGICAL RELATION OF PHILIPPINE LAWS, ACTS OF CONGRESS, AND FACTS OF THIS CAUSE—(Continued)

Dates	Philippine Laws	Acts of Congress	Facts
	Act. No. 2622, amending Act 2541, extends the 1% tax to "consignments."	(see July 1, 1916, infra)	
July 1		Act of Congress of July 1, 1916, ratifies the internal revenue taxes imposed by Acts 2541 and 2622. (39 Stat. L. 286)	
July 1	Act No. 2657, "Administrative Code of 1916," repeals Acts above mentioned and (Sec. 1614) imposes a tax of 1% on merchants' sales and consignments abroad; does not exempt exports. This Code took effect July 1, 1916.	(see June 5, 1920, infra)	
Aug. 29		Act of Congress of Aug. 29, 1916, "Autonomy Act," Sec 11: "no export duties shall be levied or collected on exports from the Philippine Islands."	
Oct. 1 to Dec. 31			The period during which exports were made and taxes thereon levied in both cases, for which judgments were secured.

TABLE SHOWING CHRONOLOGICAL RELATION OF PHILIPPINE LAWS, ACTS OF CONGRESS, AND FACTS OF THIS CAUSE—(Continued)

Dates	Philippine Laws	Acts of Congress	Facts
1917 Jan.			Taxes paid, protested, and actions herein started.
Oct. 1	Act No. 2711, "Administrative Code of 1917" effective Oct. 1, 1917, supersedes Act 2657; reimposes (Sec. 1459) the tax of 1% on merchants' sales and consignments abroad, without exempting exports. Sec. 1459 is still in force.	(see June 4, 1918, infra)	
Nov. 26			Judgments secured by respondents in Court of First Instance, Manila.

TABLE SHOWING CHRONOLOGICAL RELATION OF PHILIPPINE LAWS, ACTS OF CONGRESS, AND FACTS OF THIS CAUSE—(Continued)

Dates	Philippine Laws	Acts of Congress	Facts
1918			
June 4		Act of Congress of June 4, 1918 ratifies the taxes imposed by Sec. 1459 of Act 2711. (40 Stat. L. 597)	
1920			
March			Judgments herein secured in Philippine Supreme Court.
June 5		Act of Congress of June 5, 1920, ratifies taxes imposed by Sec. 1614 of Act 2657. (41 Stat. L. 1025)	

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BRIEF FOR RESPONDENTS

"Preliminary Observation"

This action was commenced and prosecuted under the Philippine Code of 1916. Section 1721 provides for the action, and in case of judgment, Section 1725 provides for its payment by the Collector of Internal Revenue. Under the circumstances, James J. Rafferty, defendant below, petitioner here, should be continued. Therefore, respondents cannot and do not consent to the substitution proposed by petitioner on p. 1 of his brief.

To the statement of petitioner, respondents would add that in case No. 140, that of Compania General De Tabacas, the answer of petitioner alleges (Record, p. 12), "plaintiff consigned to its agents abroad merchandise," (upon which the tax in question was imposed); and in case No. 142, the Visayan Refining Company case, the answer of petitioner alleges "plaintiff shipped the said 2,268,704 tons of cocoanut oil from the port of Cebu in the Philippine Islands, consigned to its agents in the port of New York, in the United States of America"—(upon which the tax in question was imposed) (Record, p. 7).

In case No. 140 the goods were shipped abroad and the tax thereon imposed, for which judgment was secured, during the months of October, November and December, 1916; and in case No. 142 the cocoanut oil was shipped and the tax thereon imposed for which judgment was secured during the months of November and December, 1916. Thus, the transactions were all in 1916 but subsequent to August 29th, the date of the Autonomy Act prohibiting taxes on exports.

ARGUMENT

I

The Transactions Involved Were Exports

Petitioner argues that shipments from the Philippine Islands to the United States are not "exports from the Philippine Islands," within the meaning of sec. 11 of the Autonomy Act, which prohibits the levy and collection of duties on such exports. This contention, if sound, would lead to the amazing conclusion that Congress permitted the imposition of a burden on trade with the United States which was forbidden to be laid upon trade with foreign countries.

Thus, goods shipped to the United States would be burdened with a tax, while those shipped to other countries would go free. This is directly opposed to the principle upon which trade relations between the United States and its possessions have been most carefully built up. Congress, time and again, has legislated to give preferential markets to goods imported into the United States from the possessions, and to goods exported from the United States into the possessions. Therefore, the interpretation urged by petitioner is in direct contradiction to the policy of Congress from the beginning to the present hour. To assume that Congress intended to place a special burden upon commerce between the Philippine Islands and the United States is to assume Congress intended to drive Philippine commerce away from the United States, and to foreign countries. According to this theory, we are to assume Congress intended to betray the interests of the people, an important part of whose Government it is.

In the Compania General case, No. 140 (Record, p. 12), respondent alleged in its complaint that the goods were "exported," and petitioner admitted in his answer that "plaintiff consigned to its agents abroad, merchandise" (upon which the tax was paid). As petitioner admits the goods were "consigned abroad," it is difficult to see how he can deny they were "exported."

In the Visayan case, No. 142, petitioner alleges: "plaintiff shipped the said * * * oil from the port of Cebu in the Philippine Islands, consigned to its agents in the port of New York in the United States of America," (Record, p. 7). While this language does not use the word "export," nevertheless no more descriptive language of an export could be employed. He alleges, by descriptive language, that the goods were shipped from a port in one country to a port in another. He evidently sought to

bring it under the law placing a tax on goods "consigned abroad"—in other words, an export. He should not deny it that character now.

While the Philippines are not foreign, they are not domestic territory, respecting citizenship, customs, immigration and commerce.

The Insular cases established that the Philippines are not foreign territory, as of course they could not be. Those cases also established that the Philippines are not domestic territory similar to a State or Territory of the United States. Congress has always clearly distinguished the Philippines from purely domestic territory.

Thus, a citizen of the Philippines is not a citizen of the United States, and can become such only by naturalization or Act of Congress. This Court held, and Congress has ever recognized, that the Philippines and the United States constitute two separate territories or countries for the purpose of customs duties. Congress has continually enacted special tariff laws for the Philippines. It is no longer contended in any quarter, that the tariff laws of and for the United States apply also to the Philippines. A separate tariff law for the Philippines has always been the rule. Can it be denied that shipments from one tariff jurisdiction into another are exports?

The Autonomy Act (August 29, 1916) (39 Stat. L. 545), in Section 12, grants general legislative powers to the Philippine Legislature. The grant extends to the enactment of a tariff law, subject to certain restrictions prescribed in Section 10, and to laws regulating immigration and coinage, they to receive the approval of the President of the United States.

Congress has expressly separated the Philippines from the United States in respect to the application of shipping laws.

"The same tonnage taxes shall be levied, collected and paid upon all foreign vessels coming into the United States from the Philippine Archipelago, which are required by law to be levied, collected and paid upon vessels coming into the United States from foreign countries."

(33 Stat. L. 181, Sec. 6, Approved April 15, 1904.)

Also the following:

"The laws relating to entry, clearance, and manifests of steamships and other vessels arriving from or going to foreign ports, shall apply to voyages each way between the Philippine Islands and the United States * * and all laws relating to the collection and protection of customs duties * * * shall apply in the case of vessels and goods arriving from said Islands in the United States."

(32 Stat. L. 691, Sec. 84, Approved July 1, 1902.)

As to laws of the United States affecting coastwise shipping:

"* * * the provisions of law restricting to vessels of the United States the transportation of passengers and merchandise directly or indirectly from one port of the United States to another port of the United States, shall not be applicable to foreign vessels engaged in trade between the Philippine Archipelago and the United States."

(34 Stat. L. 154, Sec. 6, Approved April 30, 1906.)

Shipments between the Philippines and the United States have always been considered exports from the one, and imports into the other.

To catalogue here all the expressions of Congress describing shipments from the Philippines to the United States by the name of exports, would be exceedingly tedious. It will be sufficient to cite several instances illustrative of the principle. (All italics are supplied.)

"All articles, the growth and product of the Philippine Islands, admitted into the ports of the United

States free of duty under the provisions of this Act * * * shall be hereafter exempt from any *export duties* imposed in the Philippine Islands."

(32 Stat. L. pt. I, p. 54, March 8, 1902.)

Again in the Act of March 8, 1902:

"That all articles manufactured in bonded manufacturing warehouses (in U. S.) * * * shall not be charged with duty except the duty levied under this Act upon *imports into the Philippine Islands.*"

(32 Stat. L. 54, Sec. 6.)

Philippine Tariff Act of 1905:

"*Provided,* that the rates of duty levied, collected and paid upon products of the Philippine Islands coming into the United States, shall be less any *export duty or taxes levied, collected and paid thereon upon the shipment thereof from the Philippine Islands* * * *",

also,

"All articles, the growth and product of the Philippine Islands admitted into the ports of the United States free of duty * * * shall be exempt from any *export duties* imposed in the Philippine Islands."

(33 Stat. L. p. 928, Sec. 13, Approved March 3, 1905.)

Philippine Tariff Act of 1909:

"There shall be levied, collected and paid upon all articles * * * entering the jurisdiction of the Philippine Islands from any place or places, including the United States and its possessions * * * the rates of *import* duty which are by this Act specifically provided." (Sec. 1.)

Also:

"That upon the exportation to any foreign country from the Philippine Islands, or the shipment thereof to the United States, there shall be levied, collected and paid thereon, the following *export duties:* Provided further, that all articles the growth and product of the Philippine Islands * * * shall

be exempt from any *export duties* imposed in the Philippine Islands." (Sec. 13.)

Also:

"When *importation* into the Philippine Islands is from a country other than the United States * * * when the *importation* is from the United States of America", (Sec. 18).

(36 Stat. L. 130, Approved August 5, 1909.)

Also from the same Tariff Act of 1909:

"That importation or shipment into the Philippine Islands of the following articles is prohibited:

"(a) Dynamite * * * except in accordance with the enactment of the Philippine Legislature or when *imported* by or for the use of the United States or Insular Governments."

(36 Stat. L. 130, Sec. 3.)

Quoting further from the Philippine Tariff Act of 1909:

"That in addition to taxes imposed by this Act, there shall be levied and collected on goods, wares, or merchandise when *imported* into the Philippine Islands from countries *other than the United States.*" (Sec. 24.)

Also:

"That no drawback shall be paid * * * on account of any articles, goods, wares or merchandise, *exported to the United States of America.*"

(36 Stat. L. 130, Sec. 22.)

From the United States Tariff Act of 1909:

"Free entry of sugar to be *imported into* the United States from the Philippine Islands."

(36 Stat. L. 11, Sec. 5.)

Also:

"That all articles * * * of the Philippine Islands, admitted into the ports of the United States free of duty * * * shall be hereafter exempt from the payment of any *export duties* imposed in the Philippine Islands."

(36 Stat. L. 11, Sec. 5.)

One of the latest Congressional expressions reads:

> "No distilled spirits * * * shall be *imported* into the United States from any foreign country * * * or the Philippine Islands."
> (40 Stat. L. 1106, Approved Feb. 24, 1919.)

It is true, in describing shipments between the Philippines and the United States, Congress frequently has adopted descriptive phrases rather than the words "exports" and "imports." Nevertheless, the specific words have very frequently been used, and on the other occasions, the language is such as to characterize such shipments as *exports* and *imports*. Congress having so frequently expressed itself in respect to such shipments, it must have had such expressions in mind when it enacted Section 11 of the Autonomy Act of August 29, 1916, providing that no export duty shall be levied or collected on exports from the Philippine Islands.

The United States Attorney General holds that goods shipped from the Philippine Islands to the United States are exports.

This exact point has received an elaborate opinion of the Attorney General of the United States. (26 Op. Atty. Gen. 356—1907.)

The Dingley Tariff Act of 1897, 30 Stat. L. 151, provided for a drawback in the following words:

> "Where imported materials on which duties have been paid are used in the manufacture of articles, * * * there shall be allowed on the exportation of such articles a drawback, etc." (Sec. 30.)

The opinion referred to was on the application of the above to materials imported from the Philippines into the United States, and used in the manufacture of goods. The Attorney General held that while the Philippines

are not foreign territory, their situation is such that commodities shipped therefrom into the United States can properly be termed imports, and the drawback should be allowed, saying:

> "both the spirit and the letter of Section 30 are broad enough to include materials brought into this country from the Philippine Islands, and subjected to duty as coming from a territory which, although not a foreign country, has not been permanently incorporated into the United States; (Downes vs. Bidwell, 182 U. S. 244; Dorr vs. United States, 195, U. S. 138, 143), and has been temporarily treated in Congressional legislation as not within the United States for tariff purposes." P. 359.

Also:

> "It is nevertheless clear that under the special legislation relating to the temporary organization of the Philippine Islands, they are treated as territory remaining as yet outside of the United States in a tariff sense for the purpose of imposing duties on articles shipped from them 'into' the United States, analagous to those imposed on imports from a foreign country, and having such status that the term 'imports' can be naturally and properly applied to merchandise brought from them into the United States, a view which is supported by the language used in the opinion of the Court in Downes vs. Bidwell (182 U. S. 244, 287) in reference to the Foraker Act which imposed duties on trade between Porto Rico and the United States under similar conditions to those now existing between the Philippine Islands and the United States, in which it was said that 'the Foraker Act is constitutional so far as it imposes duties upon *imports* from such Island.'"
>
> (26 Op. Atty. Gen. 355, 359, 360.)

The tax of sec. 1614 of Act 2657, in so far as it falls upon export sales, is an export duty.

The percentage tax on merchants' sales is called a "privilege tax on business or occupation" (Act 2657, sec. 1593), and it is urged that a tax imposed upon the privilege of selling merchandise, even in so far as it is measured by the gross price of export sales, is not a duty on exports. This argument has been discredited since *Brown* v. *Maryland*, 12 Wheat. 419. In that case it was decided that a statute requiring importers to pay a license tax for the privilege of selling their imports did, in effect, impose an import duty. By way of illustration Chief Justice Marshall says (p. 445):

> "Now, suppose the United States should require every exporter to take out a license, for which he should pay such tax as Congress might think proper to impose; would Government be permitted to shield itself from the just censure to which this attempt to evade the prohibitions of the Constitution would expose it, by saying, that this was a tax on the person, not on the article, and that the legislature had a right to tax occupations?"

If a license tax of fixed amount, such as was condemned in *Brown* v. *Maryland*, on the occupation of an exporter is within the prohibition of duties on exports, even less defensible is a tax on such occupation which is directly proportioned to the volume of the business of exporting. In its effect upon the export business of respondents, the tax of sec. 1614 is exactly the same as if an export duty of 1% were frankly levied. Constitutional limitations may not be evaded by indirection, and the validity of a statute is to be determined by its effect, not by its form. *Cummings* v. *Missouri*, 4 Wall. 325; *Henderson* v. *Wickham*, 92 U. S. 259; *Fairbank* v. *United States*, 181 U. S. 283; *Bailey* v. *Alabama*, 219 U. S. 219.

A stamp tax on export bills of lading is an export duty.

Fairbank v. *United States, supra.* But it would be merely tedious to cite further authorities and to argue the principle at length, for this court has recently passed upon the exact question in a case which, despite petitioner's opinion to the contrary, seems to us indistinguishable. *Crew Levick Co.* v. *Commonwealth,* 245 U. S. 360.

Attention is directed to an important feature of this point raised by petitioner, a feature that appertains to his immediately succeeding point. Neither was raised in the courts below; both are here urged for the first time. This Court holds that points available when the case was presented to the Philippine Supreme Court and not there urged, will not be considered upon review here. *De la Rama* v. *De la Rama,* 241 U. S. 154.

Neither of these points, therefore, is properly before this court, but as they can be very easily answered, respondents present the plain arguments against them.

II

The taxes in question were not legalized by the Act of Congress of July 1, 1916.

The judgment under review affects taxes levied and collected under the ostensible authority of sec. 1614 of Act 2657; no others are involved in this case. Act 2657 was approved February 24, 1916, took effect July 1, 1916, and was superseded by Act 2711 October 1, 1917. The percentage tax on sales immediately before July 1, 1916, was found in Acts 2541 and 2622, which took effect January 1, 1916. By a provision inserted in an appropriation Act of July 1, 1916 (39 Stat. L. 286), Congress ratified the internal revenue taxes imposed by Acts 2541 and 2622. It is now contended that this ratification affords sanction for the taxes imposed by Act 2657.

The argument is best answered by quoting the ratification of 1916:

> "That the internal revenue taxes imposed by the Philippine Legislature under the law enacted by that body on December twenty-first, nineteen hundred and fifteen (No. 2541), as amended by the law enacted by that body on February 4, 1916 (No. 2622) * * * are hereby legalized and ratified, and the collection of all such taxes heretofore or hereafter is hereby legalized, ratified and confirmed as fully to all intents and purposes as if the same had by prior Act of Congress been specifically authorized and directed."

Bearing in mind that Act 2657, expressly repealing and superseding Acts 2541 and 2622, had been on the statute books for more than four months and took effect the very day that Congress acted, it requires hardihood to assert that Congress intended to include Act 2657 by specifying Acts 2541 and 2622. "When terms are unambiguous we may not speculate on probabilities of intention." *Insurance Co.* v. *Ritchie,* 5 Wall. 541, 545.

Even if the intention of Congress were open to inquiry, every apparent reason must impel the restrictive interpretation. This court in *Lincoln* v. *United States,* 197 U. S. 419 and 202 U. S. 484, and in *United States* v. *Heinszen & Co.,* 206 U. S. 370, had clearly marked the difference in effect between a specific and a general ratification. Congress had abolished Phillippine export duties by Act of October 3, 1913, (38 Stat. L. 193), and forbade that method of taxation in the Autonomy Act of Aug. 29, 1916. It may well be supposed that the ratification of July 1, 1916, (in so far as it affected export duties), was conceded only by way of exception to the general policy of Congress and only because the statutes validated by the ratification were already superseded. To condone a temporary excess of authority

in the past was one thing; to grant increased authority for future exercise was quite another.

Since 1902 Philippine import and export duties have been prescribed by Congress, and the invasion of this reserved function by various so-called internal revenue laws of the Philippine Legislature has led to a series of curative acts in which Congress has invariably employed the formula of specific ratification. 35 Stat. L. 615; 38 Stat. L. 1143; 39 Stat. L. 286; 40 Stat. L. 597; 41 Stat. L. 1025. As each Philippine statute took effect, whether we call it the re-enactment of an old law or the enactment of a new, it became the collector's authority to the exclusion of its predecessor, and Congress in every instance restricted its ratification to the taxes imposed "under" or "in" a specified act, and to the collection of "such taxes." If Congress by the Act of July 1, 1916, had authorized the re-enactment of provisions similar to those specifically ratified, why the superfluous ratifications of 1918 and 1920? And if in 1918 and 1920 Congress was actuated, not by an appreciation of necessity, but merely by a purpose to dispel doubts, why the consistent adherence to the formula of specific ratification?

The taxes in question were not legalized by the Act of Congress of June 4, 1918.

The taxes affected by the judgment herein were levied and collected under the ostensible authority of Act 2657, after the prohibition of export duties by sec. 11 of the Autonomy Act, and while that prohibition stood unimpaired. Act 2657 was superseded October 1, 1917, by Act. 2711, under whose ostensible authority similar taxes were thereafter levied and collected. By a provision of the appropriation act of June 4, 1918 (40 Stat. L. 597), Congress ratified the taxes imposed by Act 2711. Petitioner

argues that this ratification legalized the taxes imposed by Act 2657.

Again the language of Congress affords the conclusive answer:

> "The taxes imposed by the Philippine Legislature in section fourteen hundred and fifty-nine of the act numbered twenty-seven hundred and eleven, enacted by that body on March tenth, nineteen hundred and seventeen, are hereby legalized and ratified, and the collection of all such taxes heretofore or hereafter is legalized, ratified and confirmed hereby as fully to all intents and purposes as if the same by prior Act of Congress specifically had been authorized and directed."

What has been said above of the ratification of 1916 is applicable to this Act of 1918. If possible, the reasons for the strict interpretation of the later enactment are more convincing. There is not only the presumption that Congress was advised of Act 2657, but the research of petitioner (brief, p. 27) shows that the situation was fully explained by the Governor-General, through the Secretary of War. Congress was advised that the Philippine Government had collected in defiance of Congress about $2,000,000 of export duties under Act 2657 and desired the sanction of Congress for the retention of such collections. The response in the form of a ratification limited to taxes "imposed in section 1459 of the act numbered 2711," is as clear a denial of the appeal of the Governor-General as could be framed. There is no repeal of sec. 11 of the Autonomy Act, and the evident purpose is to grant a limited exception rather than to abandon the principle of the prohibition of export duties. Congress may have been disposed to grant relief from the time when the Philippine Government, by the Governor-General's letter, evidenced a law-abiding sentiment; this must have been, as

petitioner shows, about October 1, 1917, which was moreover a convenient starting-point. But Congress must have been reluctant to stultify wholly the prohibition of export duties of the Autonomy Act, and wholly to condone the impudent disregard of the effect of that prohibition upon sec. 1614 of Act 2657.

This series of enactments of the law placing a tax on merchandise sales, may be considered each an amendment of its predecessor, as each differed in some important particular from its predecessor. Act No. 2541 amends Act No. 2339 by repealing the exemption of exports. Act. No. 2622 amends Act. No. 2541 by extending its terms to "consignments." Act No. 2657, Sec. 1614, repeals Act No. 2622 and amends its terms by introducing the word "abroad" so as to read "consignments abroad." Had Congress intended to rectify on June 4, 1918, all the taxes theretofore imposed and collected, it would have ratified those imposed under the first enactment, with all "amendments thereof." Congress did no such thing. It followed its uniform custom of ratifying the taxes collected under a single enactment, specifically naming it.

III

The Act of Congress of June 5, 1920, can not have the effect of confiscating the judgments under review.

The Compania General case, No. 140, was commenced in the Court of First Instance of Manila on January 23, 1917. (Record, p. 9.) Judgment in favor of respondent was rendered by that Court November 26, 1917. Both parties appealed to the Supreme Court and judgment there was given in favor of respondents, March 16, 1920. (Record, p. 31.)

The Visayan Refining Co. case, No. 142, was com-

menced in the Court of First Instance of Manila, on January 20, 1917 (Record, p. 5). Judgment in favor of respondent was entered by that Court on November 26, 1917. Both parties appealed to the Supreme Court, and therein judgment was rendered in favor of respondent, March 18, 1920. By these judgments respondents became entitled to recover from petitioner the amounts which petitioner had exacted as taxes under the ostensible authority of section 1614 of Act 2657. June 5, 1920, Congress in an appropriation act (41 Stat. L. 1025) provided:

> "The taxes imposed by the Philippine Legislature in section 1614 of the Act numbered 2657, enacted by that body on February 24, 1916, are legalized and ratified, and the collection of all such taxes made under or by authority of such Act of the Philippine Legislature is legalised, ratified, and confirmed as fully to all intents and purposes as if the same had by prior Act of Congress been specifically authorized and directed."

Petitioner contends that this enactment is effective, not only to validate the collection of such taxes as were paid without protest, not only to defeat pending actions for the recovery of taxes exacted without prior authority —but also to reverse, annul, or confiscate, the judgment herein reviewed.

For the purpose of argument under this head it must be assumed that the ratification intends the effect attributed to it by petitioner: To operate retrospectively; to supply for the period of the controverted collections the authority which at the time was not only withheld from, but specifically denied to, the Philippine government and its officials; to apply, not only to collections undisputed or still in controversy, but to obligations merged in judgment; concretely, to relieve and dis-

charge James J. Rafferty from his judgment debt to respondent. Later it will be argued that the ratification may not be so construed; but the present question is whether Congress had power to accomplish what petitioner claims—whether the Act, with petitioner's construction, is valid.

It is significant that the diligence of petitioner's counsel has produced no reported case wherein a curative statute has been held effective to divest a right reduced to judgment. (Note the admission of failure at p. 46 of brief). The decisions upholding retrospective statutes to cure irregularities as against claims not reduced to judgment, of which many are quoted or cited by petitioner, do not require particular notice. All are distinguishable in that they do not involve the overthrow of judgments, and most of them present other obvious and vital differences that make them inapplicable herein. None of them goes so far toward being in point as *United States* v. *Heinszen & Co.*, 206 U. S. 370, and if, as respondents will endeavor to show, that case is not controlling, all the others fall with it.

The proposition that a statute may divest rights established by a judgment is so abhorrent to our fundamental principles and to natural justice, as well as to familiar constitutional limitations, that there are few instances in our jurisprudence where the attempt has been made and passed upon. Nevertheless, there is plain condemnation of the theory in the decisions of this Court.

> "It is not within the power of a legislature to take away rights which have been once vested by a judgment." *McCullough* v. *Virginia*, 172 U. S. 102, 123.
>
> "It is undoubtedly true that legislatures cannot set aside the judgments of courts." *Stephens* v. *Cherokee Nation*, 174 U. S. 445, 478.

"But it is urged, that the Act of Congress cannot have the effect and operation to annul the judgment of the court already rendered, or the rights determined thereby in favor of the plaintiff. This, as a general proposition, is certainly not to be denied, especially as it respects adjudication upon the private rights of parties. When they have passed into judgment the right becomes absolute and it is the duty of the court to enforce it. * * * Now, we agree, if the remedy in this case had been an action at law, and a judgment rendered in favor of the plaintiff for damages, the right to these would have passed beyond the reach of the power of Congress." *Pennsylvania* v. *Wheeling & B. B. Co.*, 18 How. 421, 431.

In the State courts there is an unbroken line of authorities denying the power of the legislature to vacate judgments, to grant new trials, or in the form of curative statutes to divest judgment rights. In these cases the condemnation of the statute is generally based upon legislative invasion of judicial power, but in all it might equally have been said that the statutory assault upon vested rights was not due process of law, and in some of the decisions this is recognized.

Haley v. *City*, 68 Penn. St. 45
Taylor v. *Place*, 4 R. I. 337
Sanders v. *Cabaniss*, 43 Ala. 184
Lawson v. *Jeffries*, 47 Miss., 702
Griffin v. *Cunningham*, 20 Gratt. 54

While *United States* v. *Heinszen & Co., supra*, holds that a Congressional ratification may destroy a mere right of action, practically overruling in this respect *De Lima* v. *Bidwell*, 182 U. S. 1, yet the reasoning, by distinction, compels the conclusion that a claim reduced to judgment is immune. In the quotation the italics are supplied.

"Nor does the mere fact that, at the time the ratify-

ing statute was enacted, this action *was pending* for the recovery of the sums paid, cause the statute to be repugnant to the Constitution. The mere commencement of the suit did not change the nature of the right. * * *

"Considering how far the bringing of actions would operate to deprive government of the power to enact curative statutes which, if the actions had not been brought, would have been unquestionably valid, Cooley, in his Constitutional Limitations, says (7th ed. p. 543):

'"Nor is it important, in any of the cases to which we have referred, that the legislative act which cures the irregularity, defect, or want of original authority, was passed after suit brought, in which such irregularity or defect became matter of importance. The bringing of suit vests in a party no right to a particular decision (cases cited); and his case must be determined on the law as it stands, not when the suit was brought, but *when the judgment is rendered.* (Cases cited.)'" (p. 387.)

The judgments herein are final, to the extent of creating a property right that cannot be divested by subsequent legislation.

It is immaterial that the judgments may not be immediately executed because of the granting of a writ of certiorari herein. The immunity of respondents' judgments from legislative confiscation does not depend upon their finality in the sense of not being subject to judicial review. If the interposition of this court had the effect of vacating the judgments and bringing the causes here to be tried *de novo*, the case might, arguably, be different; but upon the allowance of the writ, the judgment is reviewed "as if brought up by writ of error," and it is precarious only to the extent that error may be found. If the judgment is declared free from error, its affirmance by this court will in no way enhance its value or change its character. The ultimate question is

whether the judgments are "property" of respondents, such as may not be taken without due process; the review herein is an examination of respondents' title to the property—not a proceeding from which such title may arise. A judgment creditor in a case reviewable for error may be divested of his property in the judgment, but only by "due process of law"—which judicial reversal is, and legislative confiscation is not.

Heinszen Case further distinguished.

There is a fundamental difference between the ratification sustained in *United States* v. *Heinszen & Co., supra,* and the ratification asserted by petitioner herein, in that the one supplied a mere *absence* of prior authority, while the other is invoked to cure an express *denial* of authority. This difference is inferentially recognized in the *Heinszen* opinion, where the court says (p. 382):

> "Where an agent, *without* precedent authority, has exercised in the name of the principal a power which the principal *had the capacity to bestow*, the principal may ratify and affirm the unauthorized act, and thus retroactively give it validity when rights of third parties *have not intervened*, is so elementary as to need but statement." (Italics supplied.)

It is equally obvious that where the principal has denied authority to his agent and third parties have relied upon such denial, the principal may not thereafter retroactively give validity, in prejudice of such third parties, to acts of the agent in contumacious exercise of the power denied.

The principles involved are those of agency, as the *Heinszen* decision makes clear, and the distinction may be made plain by a simple illustration. If my pretended

agent, without precedent authority, collects rents from an occupant of my house, I may ratify such collection; but if I have agreed with my tenant that his rent shall be $100 per month, and my agent compels him to pay under duress and protest $150 per month, no ratification on my part would validate the extortion. So, when Congress enacted "that no export duties shall be levied or collected on exports from the Philippine Islands," it deprived itself for so long as the prohibition stood unrepealed of "the capacity to bestow" power to collect such duties. The prohibition was revocable at the will of Congress, but so long as it remained in force as a restriction on the Philippine Government and its tax-collectors, third parties enjoyed the right of exemption from export duties, terminable, but not subject to be retroactively divested.

Mr. Justice Harlan, concurring in the majority opinion in the *Heinszen* case, says (p. 391):

> "Interpreted in the light of previous and pending litigation, this act should be construed as denying the authority of any court to take cognizance of a suit brought against the United States to recover any claim arising out of such collections. The act should, therefore, be construed as withdrawing the consent of the United States to be sued on account of claims of that character. In this view, it was error to render judgment against the United States, whatever might be the liability of the Collector, if his exaction of the duties in question was without authority of law. Upon this ground alone and without considering any of the questions discussed in the opinion of the court, I concur in the judgment of reversal."

The distinction is clear between an Act of Congress withdrawing the government's consent to be sued, and an Act which pretends to relieve one individual from his judgment debt to another.

Respondents' vested rights in their judgments are analogous to vested rights secured by exemption from taxation.

There is no more familiar example of vested rights immune from a taking without due process than exemption from taxation. Such exemption is commonly in perpetuity or for a fixed period, but it might imaginably be granted without term. Can it be doubted that an attempt to take away such exemption retrospectively would be invalid? Whether such an exemption is definite or precarious, it is property and has been held by this Court to be protected by the Constitution against Congressional action. In the case of *Choate v. Trapp*, 224 U. S. 665, it appears that Congress by the Curtis Act of 1898, amended in 1902, provided for the allotment of tribal lands of Indians and for exemption of the individual holdings from taxation. In 1908 an Act of Congress pretended to authorize taxation of the same lands. The State of Oklahoma attempted to impose taxes and the Indians resisted. This Court, by Mr. Justice Lamar, says (p. 673):

> "The patent issued in pursuance of those statutes gave the Indian as good a title to the exemption as it did to the land itself. Under the provisions of the 5th Amendment there was no more power to deprive him of the exemption than of any other right in the property."

To the same effect is the very recent case of *Ward* v. *Love County*, 253 U. S. 17. Would not the result have been the same if the exemption from taxation had been indefinite and revocable, and Congress had attempted to ratify taxes imposed by the State before the repeal of the exemption?

Even in the Philippine Islands no person may "be deprived of life, liberty or property without due process of law."

From a misunderstanding of the "Insular Cases" and certain subsequent decisions of this Court there has arisen a wide-spread belief that Congress has power unlimited to legislate for the Insular Possessions; that none of the safeguards and limitations of the Constitution of the United States protect lives, liberties and property in the Possessions against Congressional action. This belief has no foundation in the decisions of this Court, and none in principle.

If there is no decision of this Court affirmatively applying any guaranty or limitation of the Constitution in the Philippine Islands or Porto Rico, the reason is plain; the occasion has not arisen. No case has been presented in this court wherein Congress legislating for the Possessions, has attempted to pass a Bill of Attainder, to grant a Title of Nobility, to prohibit the free exercise of religion, nor, without due process of law, to deprive any person of life, liberty or property.

In cases wherein insular legislatures have encroached upon personal rights, the decisions have been based upon the guaranties of Congressional organic laws, and the Court has avoided as unnecessary determining whether the corresponding provisions of the Constitution would have been applicable. Thus in *Kepner* v. *United States,* 195 U. S. 100, Justice Day says (p. 124): "It is not necessary to determine in this case whether the jeopardy provision in the Bill of Rights would have become part of the law of the Islands without Congressional legislation."

On the other hand, the power of Congress over the Insular Possessions is derived from the same provision of the Constitution—Art. IV, Sec. 3, par. 2—which supported the jurisdiction of Congress in the Territories

which later became States. And it has been held, as we shall see, that in legislating for those Territories Congress was not wholly exempt from constitutional limitations.

It has been held that the Uniformity Clause of Art. 1, Sec. 8, does not apply to duties imposed by Congress in the Possessions, because the section requires uniformity only "throughout the United States," and the Possessions are not a part of the United States. *Downes* v. *Bidwell,* 182 U. S. 224. But in that case even the majority of the Court conceded that the Constitution contains limitations which operate upon the power of Congress wherever exercised; and it is apparent that the decision would have gone the other way if the requirement of uniformity had been stated in the Constitution without the qualifying phrase.

It has been held, also, that the right to trial by jury conferred by the sixth amendment does not extend to the Territories and Possessions. *Hawaii* v. *Mankichi,* 190 U. S. 197; *Dorr* v. *United States,* 195 U. S. 138. But in the Mankichi case Justice Brown says for the Court (p. 217): "We would even go farther, and say that most, if not all, the privileges and immunities contained in the Bill of Rights of the Constitution were intended to apply from the moment of annexation; but we place our decision of this case upon the ground that the two rights alleged to be violated in this case (indictment by grand jury and trial by jury) are not fundamental in their nature but concern merely a method of procedure * * *." And Justices White and McKenna, concurring, point out that Hawaiian laws must yield, "Where they were inconsistent with those fundamental provisions of the Constitution which were, by their own force, applicable to the territory with which Congress was dealing."

In the Dorr case, Justice Day says:

> "The exercise of the power expressly granted to govern the territories is not without limitations. Speaking of this power, Mr. Justice Curtis, in the case of *Scott* v. *Sandford*, 19 How. 614, 15 L. ed. 787, said:
>
> " 'If, then, this clause does contain a power to legislate respecting the territory, what are the limits of that power?
>
> " 'To this I answer that, in common with all the other legislative powers of Congress, it finds limits in the express prohibitions on Congress not to do certain things; that in the exercise of the legislative power, Congress cannot pass an *ex post facto* law or bill of attainder; and so in respect to each of the other prohibitions contained in the Constitution.' " (p. 142).
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> * * * * * * *
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> "The limitations of this power were suggested by Mr. Justice Curtis in the *Scott Case*, above quoted, and Mr. Justice Bradley in the *Church of Jesus Christ of L. D. S.* v. *United States*, 136 U. S. 1, 34 L. ed. 481, 10 Sup. Ct. Rep. 792, said:
>
> " 'Doubtless Congress, in legislating for the territories, would be subject to those fundamental limitations in favor of personal rights which are formulated in the Constitution and its amendments; but these limitations would exist rather by inference and the general spirit of the Constitution from which Congress derives all its powers, than by any express and direct application of its provisions.' " (p. 146.)

In *Downes v. Bidwell*, 182 U. S. 262, Justice Brown says, for the majority of the Court:

> "To sustain the judgment in the case under consideration, it by no means becomes necessary to show that none of the articles of the Constitution apply to the island of Porto Rico. There is a clear distinction between such prohibitions as go to the very root of the power of Congress to act at all, irrespective of time

or place, and such as are operative only 'throughout the United States' or among the several States.

"Thus, when the Constitution declares that 'no bill of attainder or *ex post facto* law shall be passed,' and that 'no title of nobility shall be granted by the United States,' it goes to the competency of Congress to pass a bill *of that description.* Perhaps the same remark may apply to the 1st Amendment, that 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to peacefully assemble and to petition the government for a redress of grievances.' We do not wish, however, to be understood as expressing an opinion how far the bill of rights contained in the first eight amendments is of general and how far of local application." (p. 276.)

* * * * * * *

"We suggest, without intending to decide, that there may be a distinction between certain natural rights enforced in the Constitution by prohibitions against interference with them, and what may be termed artificial or remedial rights which are peculiar to our own system of jurisprudence. Of the former class are the rights to one's own religious opinions and to a public expression of them, or, as sometimes said, to worship God according to the dictates of one's own conscience; the right to personal liberty and individual property; to freedom of speech and of the press; to free access to courts of justice, to due process of law, and to an equal protection of the laws; to immunities from unreasonable searches and seizures, as well as cruel and unusual punishments; and to such other immunities as are indispensable to a free government. * * *" (p. 282.)

In the same case Mr. Justice White, for himself, and for Mr. Justice Shiras and Mr. Justice McKenna, concurring says:

"While, therefore, there is no express or implied limitation on Congress in exercising its power to

create local governments for any and all of the territories, by which that body is restrained from the widest latitude of discretion, it does not follow that there may not be inherent, although unexpressed, principles which are the basis of all free government which cannot be with impunity transcended" (p. 290).

* * * * * * *

"Undoubtedly there are general prohibitions in the Constitution in favor of the liberty and property of the citizen, which are not mere regulations as to the form and manner in which a conceded power may be exercised, but which are an absolute denial of all authority under any circumstances or conditions to do particular acts." (p. 294).

The grounds of dissent in the Insular cases show that *all* of the Justices were agreed that the "general prohibitions" in support of "natural rights" limited the power of Congress to legislate for the Possessions.

Among these effective limitations is certainly that of the 5th Amendment:

"No person shall * * * be deprived of life, liberty, or property, without due process of law."

In *Fletcher* v. *Peck*, 6 Cranch 87, the State of Georgia had authorized by statute the sale of state lands. After conveyances had been made by virtue of this statute the State Legislature by another statute undertook to annul and rescind the first law and to avoid the titles acquired by its authority. The case involved the prohibition of Art. I, sec. 10, whereby the States are forbidden to impair the obligation of contracts. But the opinion of Chief Justice Marshall is of especial interest for our present inquiry.

"Is the power of the legislature competent to the annihilation of such title, and to a resumption of the property thus held? (p. 135).

"The principle asserted is, that one legislature is competent to repeal any act which a former legislature was competent to pass; and that one legislature cannot abridge the powers of a succeeding legislature.

"The correctness of this principle, so far as respects general legislation, can never be controverted. But, if an act be done under a law, a succeeding legislature cannot undo it. The past cannot be recalled by the most absolute power * * *

"It may well be doubted whether the nature of society and of government does not prescribe some limits to this legislative power; and, if any be prescribed, where are they to be found, if the property of an individual, fairly and honestly acquired, may be seized without compensation?

"To the legislature all legislative power is granted; but the question, whether the act of transferring the property of an individual to the public, be in the nature of the legislative power, is well worthy of serious reflection.

* * * * * * *

"The validity of this rescinding act, then, might well be doubted were Georgia a single sovereign power * * * (p. 136).

* * * * * * * * * * *

"The state legislatures can pass no *ex post facto* law. An *ex post facto* law is one which renders an act punishable in a manner in which it was not punishable when committed. Such a law may inflict penalties on the person, or may inflict pecuniary penalties which swell the public treasury. The legislature is then prohibited from passing a law by which a man's estate, or any part of it, shall be seized for a crime which was not declared, by some previous law, to render him liable to that punishment. Why, then, should violence be done to the natural meaning of words for the purpose of leaving to the legislature the power of seizing, for public use, the estate of an individual in the form of a law annul-

ling the title by which he holds that estate? The Court can perceive no sufficient grounds for making this distinction. * * * " (p. 138).

In the same case Mr. Justice Johnson, concurring, denies the application of Act I, Sec. 10, and puts his assent squarely on the ground of general principles:

"I do not hesitate to declare that a state does not possess the power of revoking its own grants. But I do it on a general principle, on the reason and nature of things; a principle which will impose laws even on the Deity." (p. 143).

Authorities might be multiplied, but there will hardly be dissent from the principle. The confiscation of private property by legislation, "without due process of law," is so abhorrent to the whole spirit of the Constitution, that if, as the *Insular Cases* so strongly suggest, there are limitations which Congress may not disregard in legislating for the territories, the "due process clause" is one of them. Indeed, it is so specified by Justice Brown in Downes v. Bidwell, *supra*—"The right to * * * individual property * * * to due process of law."

IV

The ratification by Act of June 5, 1920, covers only the period between July 1 and Aug. 29, 1916.

It will be convenient here to review the pertinent facts and dates. Act 2657 was approved in February, 1916, and took effect July 1, 1916. Up to that time, and until August of the same year, the Philippine government lacked power to impose export duties, but there was no express denial of such power. Nevertheless, Sec. 1614 of Act 2657 purported to apply the 1% merchants' tax to export sales and consignments. The Autonomy Act was approved by Congress August 29, 1916, and in sec. 11 provided, "That no export duties shall be levied or collected on exports from the Phil-

ippine Islands," thus repealing *pro tanto* Act 2657, for, as Chief Justice Marshall says in *M'Culloch* v. *Maryland*, 4 Wheat. 316, 425:

> "A law, absolutely repugnant to another as entirely repeals that other as if express terms of repeal were used."

The amounts covered by the judgment herein were levied and collected after August 29, 1916, and under the ostensible authority of the repealed provisions of Act 2657. In 1920 Congress enacted the ratification, which, for convenient reference is here again quoted:

> "The taxes imposed by the Philippine Legislature in section 1614 of the Act numbered 2657, enacted by that body on February 24, 1916, are legalized and ratified, and the collection of all such taxes made under or by authority of such Act of the Philippine Legislature, is legalized, and ratified, and confirmed as fully to all intents and purposes as if the same had by prior Act of Congress been specifically authorized and directed."

Does this provision repeal the prohibition of sec. 11 of the Autonomy Act in so far as the latter affected sec. 1614 of Act 2657? Not expressly. But does it work such repeal by implication, as being a later statute "absolutely repugnant to" the earlier? Such a result is to be avoided if possible; if more than one construction is applicable, that must be preferred which will enable the two statutes to stand together.

> "Repeals by implication are not favored. This means that it is the duty of the Court to so construe the acts, if possible, that both shall be operative." Lewis' Sutherland, Statutory Construction, sec. 247.
>
> "The intention to repeal * * * will not be presumed, nor the effect of repeal admitted, unless the

inconsistency is unavoidable, and only to the extent of the repugnance." id., id.

25 R. C. L. 918, secs. 169, 170.

We are considering a ratification. *In United States* v. *Heinszen,* 206 U. S. 380, at page 384, Mr. Justice White adopts the statement from *Mattingly* v. *District,* 97 U. S. 687, 690:

> "The ratification, if made, was equivalent to an original authority, according to the maxim, *Omnis ratihabitio retrotrahitur et mandato priori æquiparatur.*"

And Congress in the statute itself defines the effect to be given to its action: "As fully to all intents and purposes as if the same had, by prior Act of Congress, been specifically authorized and directed." Surely it can not be thought that ratification is *more* effective than prior authorization.

Let us apply the test prescribed by Congress. Suppose that there had been in force in February, 1916, an Act of Congress which "specifically authorized and directed" the enactment of sec. 1614 of Act 2657. Then the export duties imposed by that section would have been perfectly valid until August 29, 1916, when Congress directed that they should no longer be levied or collected; after that date they would have been invalid. Such is the exact effect of the ratification; it supplies the original authority, which theretofore was lacking for sec. 1614 of Act 2657 in its application to exports, for so long as that section was effective; but it does not prolong the life of the section nor validate collections which, being made after August 29, 1916, were not "under or by authority of" the provisions then repealed.

It may be unusual, but it is by no means impossible, nor is it unprecedented, to ratify for the term of its ex-

istence a statute which has been repealed. Congress by Act of July 1, 1916, ratified Acts 2541 and 2622, which had died by repeal the day before. (See II, *supra.*) The situation would be exactly the same if the repeal and ratification had been synchronous; if the ratification of 1920 had been incorporated in the Autonomy Act together with the prohibition of export duties, the two provisions would have fitted together perfectly, the one operating retrospectively and the other prospectively.

Petitioner's sole argument against the interpretation which respondent puts upon the ratification of 1920 is that the statute provides for the legalization of the collection of *"all* such taxes." (Brief, p. 59.) Counsel's italics are not carried far enough—Congress legalized the collection of "all *such* taxes (i. e., those imposed by section 1614 of Act 2657) made *under* or *by authority of such Act*" and only *"as* fully—as if the same had by prior Act of Congress been specifically authorized and directed." The amounts which James J. Rafferty has been ordered to repay to respondents are not "taxes imposed * * * in section 1614 of the Act numbered 2657", nor were they collected "under or by authority of such Act," because that section, in so far as it imposed export duties, had been repealed or annulled by the sovereign power of Congress and no longer afforded authority for the collection of export duties. Whatever authority Mr. Rafferty may have pretended for the controverted exactions, in reality he had none.

In this respect an interesting analogy is afforded by another ratification act, as construed in *Lincoln* v. *United States,* 202, U. S. 484. In that case the disputed collections, import duties, had been collected, under the ostensible authority of an order of the President, after the ratification of the Treaty of Paris. The Court held that

the President's powers, without Congressional support, ceased with the war. Congress, by sec. 2 of the Act of July 1, 1902, ratified "the actions of the authorities of the Government of the Philippine Islands taken in accordance with the provisions of said order." It was held that the President's order, having no authority except the war power, was limited to the duration of the war as clearly as if so expressed; that import duties collected after the ratification of the treaty were, therefore, not "in accordance with the provisions of said order"; that, while Congress might have ratified such collections (as was subsequently done), the terms of the statute under consideration only affected collections made during the life of the President's order.

> "The statute does not ratify all actions or all collections of taxes, as it easily might have done, but only actions in accordance with the order." (p. 498.)

So, in these cases, the authority ratified is that of sec. 1614 of Act 2657, which, in respect to export duties, ceased on August 29, 1916, by virtue of sec. 11 of the Autonomy Act; and the ratification by its terms is limited to actions "under or by authority of" the section specified. Congress might easily have said that the ratification was of *all* collections of export duties, but chose to restrict the validation to such as were made by authority of section 1614.

Here, as in the *Lincoln* case, "Every consideration requires that the ambiguous language of the act should not be stretched beyond the exact and literal meaning of the words" (p. 499). Here, as there, the ratification has a proper and useful application in its restricted interpretation; here, as there, there were pending actions which Congress may not be presumed to have intended to destroy in the absence of clear expression of such intention—a principle of greater force herein because the actions were

not merely pending, but reduced to judgment. In *United States* v. *Heinszen & Co., supra,* the court, citing the Lincoln case, says (206 U. S. at p. 390):

> "In the course of the opinion, in answering the argument that the alleged ratifying statute would be meaningless unless it were held applicable to the particular duties in controversy, it was pointed out (202 U. S. p. 499) that there were duties levied and collected other than those in controversy, to which the act clearly applied, and 'that question (as to them) was put at rest by this ratification.' Further in calling attention to the ambiguity in the ratifying statute relied upon and the resulting doubt whether it embraced all duties, it was pointed out that the fact that actions were pending at the time of the ratifying act lent cogency to the view that, if Congress had intended by the ratification to affect them, it would have explicitly so declared. On this subject the Court said (p. 498):
>
> "'This construction is favored by the consideration that the suits had been begun when the Act of July 1, 1902, was passed, and that, even if Congress could deprive plaintiffs of their vested rights in process of being asserted (Hamilton v. Dillin, 2 Wall. 73), still it is not to be presumed to do so on language which, literally taken, has a narrower sense.'"

The conclusion that Congress intended the more restricted effect of the ratification of 1920 is further impelled by the known circumstances. In 1918 Congress was urged by the Philippine Government to ratify Act 2657 as well as Act 2711, and refused (petitioner's brief, p. 27; *supra,* p. 14). In 1920 the plea for ratification must have embraced the period involved in this cause (and in other cases still pending in the Philippine Courts). This court had pointed out the restricted scope of the ratification in the *Lincoln* case, and had added emphasis by giving broader effect to the ratification in the *Heinszen*

case. When, with all this information and advice, Congress chose to employ the formula construed in the *Lincoln* case, failed to declare explicitly its purpose to affect pending actions or judgments, refrained from ratifying *all* collections—there can be only one inference. Congress intended to sanction only the export duties collected *without* authority and before the Autonomy Act—not such duties collected in *defiance* of the prohibition while the latter stood unimpaired.

It has been argued (III *supra*), that the construction given the ratification of 1920 by petitioner would violate the guaranty of due process of law. If that contention is sound, there arises a strong presumption in favor of such a construction as will avoid the result of unconstitutionality. (Lewis' Sutherland, Statutory Construction, sec. 83; 1 Fed. Stats. Ann., p. 107; *St. Louis* v. *Arkansas*, 235 U. S. 350.) But if both constructions are possible, and both constitutional, that one must be preferred which is consonant with fairness and natural justice. Retrospective taxation, particularly on gross income, has necessarily an element of unfairness. But in this case there is more than that—sec. 11 of the Autonomy Act afforded to Philippine exporters a guaranty upon which, so long as it stood unrepealed, they were perfectly entitled to rely in making their prices and their contracts. It would have been indecent for them even to suspect that Congress would stultify its declaration and retrospectively sanction the impudent disregard by Philippine officials of the Congressional prohibition. To ratify in 1920 taxes on gross income of 1916-1917, which had been expressly prohibited during that period, would be outrageous.

> "The supposition that the government will not pay its debts or will not do justice is not to be indulged." *Gibbons* v. *United States*, 8 Wall. 269, 274.

V.

If Petitioner's collection of the taxes was unlawful, the award of interest was not error.

If petitioner unlawfully exacted the payments covered by the judgment under review, then his subsequent retention of the money was equally unlawful. The remedy for the initial wrong is repayment of the principal; the remedy for the subsequent and continuing wrong is the payment of interest.

The Philippine law forbids the courts to enjoin the collection of disputed taxes. Act 2711, sec. 1578; Act 2657, sec. 1720. The only redress of an aggrieved taxpayer is by payment under protest, and, upon denial of administrative relief, recovery by suit. *Churchill* v. *Rafferty*, 32 Phil. 593. If Philippine statutes are construed to limit such recovery to the principal, to deny compensation for loss of use of money unlawfully taken, they must be held invalid for violation of the provisions of the Autonomy Act, Act of Congress of August 29, 1916.

If the Philippine government might not impose export duties, neither might it require of exporters involuntary and uncompensated loans. If the Philippine government had no power to collect as taxes the sums involved herein, may retain them for years and be discharged of all obligations by repayment without interest, then private property will have been taken for public use without just compensation; for the use of money is property as well as the money itself.

The Philippine Legislature could not relieve the petitioner of his personal obligation to make good the damage resulting from his unauthorized acts. A statute may properly provide that interest shall not be recoverable on voluntary loans in the absence of stipulation to

the contrary; but it is quite another thing to deny compensation for the loss of use of money taken unlawfully and under duress. If petitioner may discharge his obligation by mere repayment of principal, then the law so providing deprives respondent of the use of its money—which is property—without due process of law.

Section 1579 of Act 2711, invoked by petitioner, authorizes an action against the Collector of Internal Revenue, after the performance of certain conditions, to recover "without interest" sums unduly exacted as internal revenue taxes. Given prospective application, and limited to the special remedy which it affords, the section with its limitation may be justified. If, however, it is so construed as to apply to an action to recover sums exacted under the authority of a former law, superseded by Act 2711, which authorized recovery with interest, section 1579 contravenes the Autonomy Act. The Philippine Supreme Court has held that section 1579 is inapplicable herein, and the presumption is strong in favor of such a construction to avoid the result of unconstitutionality. Lewis Sutherland, Statutory Construction, sec. 83, 1 Federal Statutes Annotated, p. 107; *St. Louis* v. *Arkansas*, 235 U. S. 350.

In favor of the construction adopted by the Court below, as against the theory of petitioner which would deny compensation for the unlawful retention of respondent's funds, is the rule that the legislature is presumed not to have intended to work hardship or injustice. Lewis' Sutherland, op. cit., secs. 488, 490; 1 Fed. Stats. Ann., p. 101; *Lionberger* v. *Rouse*, 9 Wall., 475.

The question turns on local law.

The award of interest by the Philippine Supreme Court is based entirely upon the construction and ap-

plication of Philippine law. The general rule in the Islands is set out in Art. 1108 of the Civil Code, cited by the Court below (Record, p. 32):

> "Should the obligation consist in the payment of a sum of money, if the debtor should become in default, the indemnity for damages, in the absence of a stipulation to the contrary, shall consist in the payment of the interest agreed upon, or, should there be no agreement, in the payment of interest at the legal rate.
>
> "Until another rate is fixed by the government, the legal rate of interest shall be six per cent per annum."

That this provision applies to the obligation to repay arising from unlawful exactions of tax collectors, has been determined by the Supreme Court of the Philippine Islands, not only in the instant cases, but in other decisions. *H. E. Heacock Co.* v. *Insular Collector*, 37 Phil., 970; *Hongkong & Shanghai Banking Corporation* v. *Rafferty*, 39 Phil., 145; *Palanca* v. *City*, XVIII Official Gazette, No. 89, p. 2725.

In the Court below the decision was unanimous in awarding interest. This circumstance makes strong the presumption which attaches to a determination of Phillipine law by the highest court of the Islands.

> "We follow and sustain the local law as applied by the court below unless we are constrained to the contrary by a sense of clear error committed." *Villanueva* v. *Villanueva*, 230 U. S., 293, 299.

Attention is here directed to the fact that the taxes for which respondents secured judgments were imposed prior to the taking effect of Sec. 1579 of Act 2711, and at a time when interest was allowable. That section took effect Oct. 1, 1917. Furthermore, the suits herein were started in January, 1917, or nine months before this Act took effect.

Therefore, as regards interest, the rights of respondents should be determined by the law in force at the time the taxes were collected, and the suits to recover were started.

These cases are governed by Section 1721 of Act 2657, the Administrative Code of 1916, in force when the taxes were collected and when the suits were brought, which reads:

> "Sec. 1721. *Recovery of tax paid under protest.* When the validity of any tax is questioned, or its amount disputed, or other question raised as to liability therefor, the person against whom or against whose property, the same is sought to be enforced, shall pay the tax under instant protest, or upon protest within ten days, and shall thereupon request the decision of the Collector of Internal Revenue. If the decision of the Collector of Internal Revenue is adverse, or if no decision is made by him within six months from the date when his decision was requested, the taxpayer may proceed, at any time within two years after payment of the tax, to bring an action against the Collector of Internal Revenue for the recovery of the sum alleged to have been illegally collected, the process to be served upon him, upon the provincial treasurer, or upon the officer collecting the tax."

Section 1725 of the same Act reads:

> "Sec. 1725. Satisfaction of judgment recovered against treasurer or other officer.—When an action is brought against any revenue officer to recover damages by reason of any act done in the performance of official duty, and the Collector of Internal Revenue is notified of such action in time to make defense against same, through the Attorney-General, any judgment, damages or costs recovered in such action shall be satisfied by the Collector of Internal Revenue upon approval of the Department head, or if the sum be paid by the person sued, shall be repaid or reimbursed to him.

"No such judgment, damages, or costs shall be paid or reimbursed in behalf of a person who has acted negligently or in bad faith, or with wilful oppression."

This is not an action against the Government.

In the case of a disputed internal-revenue tax of the United States the protestant taxpayer may sue the United States by authority of the Tucker Act, or he may sue the collector personally. If he elects the former remedy, he takes it with the limitations which are imposed upon the waiver of the sovereign's immunity; but if he chooses to sue the collector, the indirect interest of the United States and even the statutory assurance that the Treasury will respond for the judgment do not preclude a full recovery with interest and costs.

"The distinction appears to be between suits to recover moneys illegally exacted as taxes and paid under protest, brought against collectors, although the judgment is not to be paid by the collector, but directly from the Treasury, and suits against the United States." *Viuda* v. *Rafferty*, 37 Phil. 957, 965.

The defendant herein is James J. Rafferty, who was Collector of Internal Revenue during the period of the controverted collections; his office enabled him to coerce the payments.

"Collector of Internal Revenue" is the title of the chief of the Bureau of Internal Revenue (Act 2711, Sec. 1421). Internal Revenue taxes may be collected by deputies and subordinates (id., sec. 1426), or by the "Collector of Internal Revenue" himself, for example in his *ex-officio* capacity of City Assessor and Collector of Manila (id., sec. 1422). In the absence of statutory authority an aggrieved taxpayer might not sue the Philippine government nor any of its agents in his official capacity, but must rely entirely upon the personal responsibility of the officer who had

exacted the payment unduly. But since 1914, at least, the internal-revenue law has authorized an action against the "Collector of Internal Revenue," "the process to be served upon him, upon the provincial treasurer, or upon the officer collecting the tax" (Act 2711, sec 1579; Act 2657, sec. 1721; Act 2339, sec. 140). For this action it does not matter whether the protested payment had been made to the chief of the bureau or to a subordinate; the liability imposed upon the defendant is derived from the statute alone and depends upon the official position of the defendant.

As in the United States R. S. sec. 989 recognizes the personal liability of collectors and provides for their protection against personal judgments, so sec. 1725 of Act 2657, *supra*, makes similar provision for the case of judgments recovered against Philippine collectors.

The analogies indicated bring into perfect application the decisions of this Court and of inferior Federal Courts to the effect that the immunity of the Government from payment of interest does not prevent such recovery in an action against the collector, and that interest is none the less allowable because the judgment is payable out of the Treasury. Erskine v. Van Arsdale, 15 Wall., 68; Patton v. Brady, 184, U. S. 608; National Home v. Parrish, 229 U. S. 494; Sage v. United States, 250 U. S. 33; White v. Arthur, 10 Fed. 80; McClain v. Pennsylvania Co. 108 Fed. 618; Conant v. Kinney, 162 Fed. 581; State Line v. Davis, 228 Fed., 246; New York L. I. Co. v. Anderson, 263 Fed. 527.

The principle applies *a fortiori* in the Philippine Islands because Section 1725, *supra*, provides for the payment of "judgment, damages, or costs," and has been construed by the Philippine Supreme Courts to cover specifically the award of interest.

> " 'Damages' for the wrongful exaction or withholding of money is the payment of interest at the

legal rate. (Art. 1108 Civil Code.)" H. E. Heacock & Co., v. Insular Collector, 37 Phil. 970, 982.

The decision of the Philippine Supreme Court awards interest, and the opinion cites as authorities for such award the Erskine and National Home cases, *supra*, as well as Art. 1108 of the Civil Code and sec. 144 of the Internal Revenue Law of 1914 (Act. 2339), which is identical with sec. 1725, *supra*. The decision involves only the construction and application of local law, and is, of course, very persuasive. Villanueva v. Villanueva, 239 U. S. 293.

Section 1721 of Act 2657 Governs.

These actions are brought against the Collector of Internal Revenue in his official capacity. If, as contended by petitioner, they are substantially against the Philippine Government, nevertheless interest should be allowed. As pointed out, *supra*, the causes of action accrued, and the actions were brought when Sections 1721 and 1725 of Act 2657 were in force. These two sections became sections 1579 and 1583, respectively, in Act 2711, which went into effect October 1, 1917, the only change being that the words "without interest" were added in Section 1579.

The Philippine Supreme Court unanimously decided respondents were entitled to interest. They followed their decision on this subject in the case of Smith, Bell & Co., Ltd. vs. James J. Rafferty, pending here as No. 138. As far as interest is concerned, the instant cases are identical with the Smith, Bell & Co. case. In that decision the Court cited, *inter alia*, the cases of H. E. Heacock Co. v. Insular Collector, and Hongkong & Shankhai Banking Corporation v. Rafferty, *infra*, which hold that interest must be allowed under Sec. 1721 of Act 2657. Thus, the Philippine Supreme Court is unanimous in holding that if the action is substantially against the Government, it is con-

trolled as to allowance of interest, by the Administrative code of 1916.

In the *Heacock* case, 37 Phil. 982, the action was against the Collector of Customs to recover import duties, and the provisions of the internal-revenue law did not directly apply; it was held, however, on general principles, that interest was recoverable from the government in the absence of express limitation in the waiver of immunity, and the Court pointed out, by way of analogy, that sec. 144 of Act 2339 (identical with sec. 1583 of Act 2711) specifically provided for the payment of interest awarded in suits against internal-revenue officers.

In the *Hongkong Bank* case, 39 Phil. 145, a judgment had been rendered in first instance against the Collector of Internal Revenue for the recovery of sums unduly exacted as internal-revenue taxes. Pending review on appeal, the Administrative Code of 1917 came into force with the denial of interest of sec. 1579. The Court, reserving the question of the construction of sec. 1579 in other respects, held that it was not intended to operate upon rights accrued, and that plaintiff was entitled to interest under the corresponding section of the earlier laws. In the recent case of *Palanca* v. *City*, XVIII Official Gazette, No. 89, p. 2725, the Philippine Supreme Court cites and follows the Hongkong Bank Case.

The exports were made by respondents not only under the assurance of sec. 11 of the Autonomy Act, but under the guaranty of the internal-revenue law then in force that undue exactions of internal-revenue officers might be recovered with legal interest. The construction of sec. 1579 of Act 2711 whereby it is applied only to an action concerning taxes collected under the Code of which it is a part, is a fair and reasonable construction, avoids hardships and injustice, and saves a conflict with constitutional

limitations. Such construction by concurrence of all the Justices of the Philippine Supreme Court can hardly be questioned.

VI

The equities of the case are all with Respondents

Petitioner, on page 52 of his brief, admonishes that the equities of the case should be inquired into, and adds

> "The respondents in the instant cases added to the price of their merchandise the amount of the percentage taxes which they paid to the government."

In this Petitioner is mistaken. There is not a word in the record to justify it. There couldn't be, because exactly the contrary is the fact. By reference to the chronology pp. VI-IX herein, it will be observed that for a time the merchants' tax was refunded when goods were exported. In other words, exports were exempt; this because it was thought the subject of export and import duties was one exclusively within the jurisdiction of Congress. This exemption was attempted to be removed by Act 2541, December, 1915, effective January 1, 1916. Doubtless during that early part of 1916 respondents, like other merchants, did add the tax to the price, but soon thereafter, to wit, August 29, 1916, Congress passed the Autonomy Act, reorganizing the Philippine Government. It was a solemn, comprehensive, enactment, among other things defining the powers of the Philippine Legislature. It is the final expression of Congress establishing government in the Philippines. It was matured by the years of previous experience, and the deliberations of Congress extending over a long period of time. During three years, 1913 to 1916, this Bill was constantly before Congress or a committee thereof. It

was the subject of daily discussion in the Philippines, in the press and among the citizens. One of the most carefully matured features of the Bill,—one Congress insisted upon inserting in the most determined manner, was sec. 11, which said:

> "No export duties shall be levied or collected on exports from the Philippine Islands."

This solemn declaration of Congress everybody thought was the last word. Accordingly, respondents, like other merchants in export business, understood that export taxes would no longer be charged, and they considered this in making prices at foreign ports in competition with the world. In other words, they thought this tax no longer existed, and they did not add it to their prices. To assume that respondents did not expect Congress to make good its word is grotesque. To assume that, notwithstanding this express prohibition of Congress, a Philippine tax collector could retain such a tax, is equally grotesque. Respondents thought no export tax could or would be upheld, so made no provision for such tax when the goods were sold.

Even if respondents had shifted the burden by covering the percentage taxes in the prices of its exports, no equities would arise from that fact to aid the petitioner. The "ultimate consumer" is not a party to this action, and we are concerned only with the comparative equities of petitioner and respondents. If petitioner, or the Philippine Government, may plead in excuse of an unlawful spoliation of respondents that the latter have been able to retrieve their losses, then any debtor may urge as a defense that the creditor has made due provision for bad accounts.

It may not be out of place here to observe that business has, during recent years, been subjected to tax burdens almost beyond its strength to bear, this in the normal course of things. But what a remarkable situation is presented by

the claim that Congress in 1920 by a retroactive statute imposed a tax burden on the years 1916 and 1917—a tax which Congress had expressly promised business should never have to bear! Tell burdened business in 1920 it must lose property illegally seized for taxes four and three years before! Such a construction is repugnant to every sense of justice. It violates fair play between government and citizen. It destroys private rights, which is tyranny, and divests citizens of that reasonable protection under the law required by modern society.

Surely Congress cannot be presumed to have intended any such thing. Rather attribute to Congress fair and just dealing, and assume, as reason requires, that it ratified only those taxes collected prior to the Autonomy Act.

SUMMARY

Respondent contends that:

1. The taxes in question were export taxes, because levied on the value of goods exported, and, in effect, are admitted to be such.
2. They were prohibited by Congress in the Autonomy Act of August 29, 1916, and therefore were illegally collected.
3. The only ratifying statute at all applicable, is that of June 5, 1920, which must be construed to have legalized only the taxes collected before the Autonomy Act, and not those for which respondents secured judgments. If it be held that Congress intended to legalize the taxes for which respondents secured judgments then that act is null and void, in that it attempts to take property without compensation and without due process of law.
4. The judgment of the Philippine Supreme Court is conclusive respecting the interpretation of local laws governing interest; and, in any event, the decision of that court in the matter of interest

involved herein, is, in all respects, according to law and precedent, because

a. The cause of action arose and was begun under a law permitting interest.
b. Respondents must be allowed interest or they will be denied adequate remedy for the injury sustained. Private property will have been taken for an alleged public use without due compensation.

Therefore, it is respectfully submitted that the judgments of the Philippine Supreme Court herein should be affirmed.

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